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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. _____.

ROBERT BROADWELL and
E. M. B. OWNEN,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered against the above petitioners, in a case in the Supreme Court of Ohio, entitled State of Ohio vs. Robert Broadwell, E. M. B. Ownen,—No. 34,951, on Nov. 14, 1956.

REFERENCE TO OPINIONS BELOW.

The Supreme Court of Ohio rendered no opinion. The opinion of the Court of Appeals, Eighth Judicial District, Cuyahoga County, Number 23,837, is printed in Appendix A hereto, *infra*, p. 9.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on Nov. 14, 1956; application for rehearing was filed Nov. 27, 1956, and denied Dec. 5, 1956; a copy of the judgment of the Supreme Court of Ohio, the application for rehearing, and entry of denial of rehearing, and of judgment of affirmance of Cuyahoga County Court of Appeals

are printed in Appendices B, C, D, DD hereto, *infra*, pp. 17-20.

The jurisdiction is invoked under 28 U. S. C. § 1257 (3).

QUESTION PRESENTED.

Were the petitioners denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by the circumstance that they were convicted of a felony under a criminal statute of Ohio, when the indictment did not charge a crime, and the alleged crime charged in the indictment was not supported by any evidence?

PART OF SECTION OF ARTICLE XIV OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INVOLVED.

"* * * (No State shall * * *) nor shall any State deprive any person of life, liberty, * * * without due process of law * * *"

STATEMENT OF THE CASE.

The petitioners were indicted in the Common Pleas Court of Cuyahoga County, Ohio, under Section 4731.47 of the Revised Code of Ohio, entitled "Selling false medical diploma." The indictment was headed "Indictment for offer to sell false Medical Diploma." A copy of such indictment and of the statute upon which such indictment was predicated appears in Appendices E, F and G, pp. 21-23, *infra*.

The State did not claim, and there is no evidence in the record, that any such diploma or document of similar character, was ever made, prepared or published by the defendants; nor is there any evidence that any such instrument was offered for sale. The best that can be said is

that there was a discussion with certain mechanotherapists about the obtaining of a diploma from a school teaching non-allopathic medicine, and who had no purpose to receive such a diploma, and acted only to create a possible basis for an arrest.

At the trial, the prosecuting attorney opened the case by following the reference to the words of the indictment—"That Robert Broadwell and E. M. B. Ownen * * * unlawfully and fraudulently published and offered to sell to one Joseph M. Centanni a Diploma in Homeopathic Medicine * * *," by stating to the Jury that a diploma was issued. When the Defense revealed that there never was any diploma, certificate or other writing or document, the prosecuting attorney stated (page 10 of Bill of Exceptions), addressing the Court:

> "If the Court please, I would like at this time to withdraw from the opening statement any allusion that I made that a diploma was issued. If I did say that it was said in error. I would like to have the Court's permission to have my statement corrected to that extent."

Despite defense objections, the Court permitted the correction. The Court followed the permission by removing from the State the necessity of proving publication of the diploma—an indispensable element of the criminal statute and indictment. Throughout, petitioners preserved their objections and exceptions.

Motions to quash, motions to direct acquittal were overruled, and defendants below, petitioners here, were convicted of what was neither proved under the indictment, nor charged a crime under the statute. Motion for new trial was duly made, and appeal on refusal thereof perfected to the Court of Appeals, which affirmed the conviction; then motion for leave to appeal was filed to the

Supreme Court of Ohio, with assignment of error on the ground, the indictment did not charge a crime, and the alleged crime charged in the indictment was not supported by any evidence. The leave being refused, application for rehearing was duly made, and on denial, the present petition for a writ of certiorari followed.

We shall show below that the existence of the errors charged establish a denial of due process in (defendants') petitioners' convictions.

REASONS FOR GRANTING THE WRIT.

We charge

1. The indictment did not allege a crime;

2. The alleged crime charged in the indictment was not supported by any evidence.

If this be true, there is a denial of due process in violation of the Fourteenth Amendment of the Constitution of the United States.

Will anyone seriously say that a defendant may be deprived of his liberty by the action of State Courts, and have no recourse to the Supreme Court of the United States, when the charge is not proved, or a crime charged?

We are not claiming the Supreme Court of the United States is to examine and weigh evidence, but when a Court to accomplish a conviction exonerates the State from proving a charged ingredient of the crime, that goes too far and demands review for the denial of process; and so where no crime is proved.

The principles are best expressed in the earliest cases, and we quote therefrom, for the reasoning appeals.

25 Texas 722, *Hewitt v. The State*:

Syl. 1:

"The legislature cannot by law authorize the courts to dispense with the allegation in indictments

for penal offences of a material fact, which, under the law alleged to have been violated, forms the main ingredient, or is the gist of the offence."

Syl. 3:

"The legislature cannot condemn a particular act as an indictable offence, and then empower the courts in the prosecution of a party for the commission of that act thus condemned, to substitute in the indictment and proof of it, a different act, which is not the same, and which is not itself prohibited by law."

P. 728:

"* * * Bill of Rights would seem to apply to this case with great force. It is addressed to and controls the judiciary as well as the legislature."

P. 727:

"A citizen is deprived of * * * his liberty by imprisonment * * * upon a criminal prosecution, in which he is charged with a particular act, which is itself not prohibited as penal, and he is found guilty for an omission of duty in reference to that act, which is not alleged or proved against him. His conviction can hardly be said to have been by due course of law."

(This case has continuously been followed.)

Due Process includes the right to contest the charge, and be discharged, unless it is proved. See 1 Curtis 311 (U. S.) *Greene v. Briggs*, pages 325 and 326. The right is vain if it is not protected by the Constitution of the United States, when the Courts of a State are led away from their duty.

In 333 U. S. 196, *Cole v. Arkansas*, a writ of certiorari was granted where petitioners stood convicted by the State Supreme Court under a criminal statute for violation of which they had not been charged, and the conviction was reversed.

The Court said on page 201:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

This brings us to a presentation of an analysis of the indictment and the statute, so the application of the above established principles to the matter at bar will appear.

Ohio R. C. 4731.47 entitled "Selling false medical Diploma" (Appendix G, p. 23) is for this discussion separated into the pertinent elements:

> (1) "No person shall make, issue, or publish, for the purpose of sale * * * a certificate, diploma or other writing or document falsely representing
>
> (2) "the holder or receiver thereof to be a graduate of a medical school * * * and entitled to the powers, privileges, or degrees, thereby pretended to be conferred;
>
> (3) "or sell or dispose of, or offer to sell or dispose of such diploma, certificate, writing or document
>
> (4) "continuing such false representation, or use his name, * * * as a subscriber to such false and fictitious diploma * * *."

It is evident that the provisions deal with a concrete tangible thing: "a certificate, diploma, or other writing or document."

In brief, there is no violation unless such document has come into existence;—and further, it is not enough for the document (diploma or writing) to come into existence, unless the document falsely represents or pretends the diploma to have conferred the privileges or degrees.

Nowhere does the statute involved at bar make it a crime to misrepresent the contents of a diploma—the diploma must do that itself.

The indictment (Appendices E and F, pp. 22-23) averred "fraudulent publishing by the defendants (petitioners) and offer to sell a diploma that would represent Joseph M. Centinni to be a graduate of a Medical School and entitled to the powers and privileges thereby pretended to be conferred." It further averred that the defendants (not the diploma) falsely represented that said diploma would admit the Holder to the practice of Medicine.

Thus it is evident that the prosecutor intended to prove the issuance of a diploma with the contents described, for the indictment averred the publishing, and there could be no publishing of what did not ever exist. The prosecutor so told the jury in his opening statement.

When the defense showed that there were neither the existence of a diploma nor its publishing the prosecution faced a dilemma. He was conscious when drawing the indictment that the statute contemplated the existence of a diploma, and without this, there could be no sale or offer to sell, for the statute required the sale or offer to sell to be "of such diploma, certificate, writing or document containing such false representation" in the contents in the first part of the statute recited, and theretofore made, issued and published, and not one that might never be made or issued.

He (the prosecutor) believed a diploma to have come into existence, or he would not have so told the jury; he had to eliminate from the case both: issuance of a diploma and its publishing, both of which over objection the Court permitted him to eliminate, thus defendants were convicted of that which was not a crime under the statute, and with elements of the indictment not proved.

The character of the statute belonged to the category of forgeries—here of medical diplomas, and not of oral misrepresentation by a person; as only by a document's

contents could one defraud and then because of reliance upon all of the contents. The statute did not deal with what might be done in the future but possession of a diploma with statutory recitation.

In 216 Fed. (2d) 760, *Marteney v. United States*, syl. 4 reads as follows:

> "As used in criminal statutes, the words 'falsely made' and forged 'are homogeneous, partaking of each other, and describes a spurious or fictitious making as distinguished from a false or fraudulent statement and relate to genuineness of execution and not falsity of content.' "

CONCLUSION.

This cause illustrates the very evil, the jurisdiction of the Supreme Court of the United States was designed to remedy: namely, when there is a feeling against defendants who have committed no crime or one not proved to have been committed as was charged in the indictment, a State by its Courts will not be allowed to deprive petitioners of their liberties, for then the State has acted without due process of law.

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT M. KREWSON,
Counsel for Petitioners.

EDWARD C. STANTON,
JOSEPH R. SLEMMONS,
WALTER I. KREWSON,
Of Counsel.

APPENDIX A.

Opinion of the Court of Appeals.

No. 23,837.

IN THE COURT OF APPEALS OF OHIO.

CUYAHOGA COUNTY, EIGHTH DISTRICT.

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ROBERT BROADWELL and
E. M. B. OWNEN,

Defendants-Appellants.

OPINION.

July 11, 1956.

HURD, J.:

This action originated in the Court of Common Pleas of Cuyahoga County where the defendants-appellants were indicted under Section 4731.47 of the Revised Code, which reads as follows:

> "No person shall make, issue, or publish, for the purpose of sale, barter, or gift a certificate, diploma, or other writing or document falsely representing the holder or receiver thereof to be a graduate of a medical school, college, or educational institution of medicine and entitled to the powers, privileges, or degrees thereby pretended to be conferred, or sell or dispose of, *or offer to sell or dispose of such diploma, certificate, writing, or document containing such false representation* or use his name, or permit it to be used, as a subscriber to such false and fictitious diploma, certificate, writing, or document or engage in the practice of medicine and surgery under and by virtue of such fraudulent diploma, certificate, writing, or document." (Emphasis added.)

The indictment contained two counts. The pertinent parts of the first count are as follows:

> "* * * Do Find and Present, That Robert Broadwell and E. M. B Ownen on or about the 22nd day of September 1953, at the County aforesaid, *unlawfully and fraudulently published and offered to sell one Joseph M. Centanni a Diploma* in Homeopathic Medicine for the sum of $1500 without examination, attendance or study, and that said Diploma would represent the said Joseph M. Centanni to be a graduate of a Medical School and entitled to the powers and privileges thereby pretended to be conferred and *did further falsely represent that said Diploma would admit the Holder to the practice of Medicine*, the said Robert Broadwell and E. M. B. Ownen well knew said representations to be false and were made with intent to defraud." (Emphasis added.)

The second count of the indictment is similar to the foregoing except as to the date of the offense.

The jury returned a verdict finding both defendants guilty as charged on two counts and they were then sentenced to the Ohio Penitentiary, the sentences on each count as to each defendant to run concurrently. Motions for new trial were filed and overruled and the case is here appealed on questions of law.

A brief condensation of the evidence presented by the State, as appears in the record, is as follows: On September 22, 1953, Robert J. Broadwell, who had come to Cleveland a few months previously, and E. M. B. Ownen, of Arcadia, Missouri, conducted a meeting at the Hollenden Hotel, in Cleveland, attended by seven local chiropractors, whose presence was the result of certain solicitations and representations theretofore made by Broadwell. Broadwell and Ownen both outlined a plan whereby by paying $1500, local chiropractors could obtain degrees in homeopathic

medicine and licenses to practice in Ohio as doctors of medicine. Broadwell was to handle this "deal" in the Cleveland area, and the same program was being duplicated in other States.

Dr. Ownen stated that he had recently acquired a new charter for the American Non-Allopathic University, Incorporated, of Arcadia, Missouri, as the result of which his school was then in a position to issue diplomas in homeopathic medicine; that those chiropractors accepting his introductory offer were to pay $500 down and $1,000 not later than December 1, 1953, and furnish photostatic copies of their degrees and licenses in chiropractic or mechanotherapy and individual college credits; that if such applicants did not have college credits, he, Ownen, would supply the deficiencies through a certain McKinley-Roosevelt School in Chicago, where for an additional $1,000, a four-year college degree would be supplied without any attendance being required; that when their money and credits had been received, the applicants would be placed on Ownen's "preferred list," thus reserving one of thirty-six "select" places. They would immediately receive diplomas in homeopathic medicine from the American Non-Allopathic University of Arcadia, Missouri, without attendance or study, after which they would automatically receive licenses, issued in either Massachusetts, Connecticut, or Rhode Island, according to the applicant's choice, to practice as doctors in homeopathic medicine. Following this and after the applicant had taken a "fixed" total examination in four simple subjects: namely, public health, hygiene, prescription writing and homeopathic medicine, a license to practice homeopathic medicine would be issued by the Ohio State Medical Board.

Following this Hotel Hollenden meeting, namely, on October 30, 1953, Broadwell visited Dr. Centanni at his

office and again went over the details of the "deal" in the presence of Robert Drake, a Cleveland Plain Dealer reporter, who was represented as being a chiropractor and interested in getting in on the deal. Broadwell instructed Dr. Centanni to draw a check for $500 payable to the American Non-Allopathic University and to submit therewith a list of his college credits. Dr. Centanni gave Broadwell a check for $500 as instructed, in an envelope on the outside of which were listed Dr. Centenni's college credits. Broadwell put the check and envelope in his pocket and left the office. By prearrangement with the police, he was arrested immediately, and when searched, the $500 check and the envelope were found on his person.

The police then questioned Broadwell, who admitted that he had visited Dr. Centanni at his office; that he was representing a school for the purpose of helping chiropractors obtain medical degrees; that he was from Missouri and was presently working at the Forest Hill Clinic in Cleveland; that he did not have a medical degree; that he was not licensed by the State of Ohio to practice as a Doctor; that he had the title of "Doctor" by reason of having attended a school in Missouri for a couple of weeks; that he was a representative of a certain Dr. Ownen, of Missouri "from the American Non-Allopathic University" and was here to recruit students and offer a course to help them obtain medical degrees; that the papers and credentials of such students were to be sent through the State of New Jersey, following which New Jersey would return the papers to Ohio for processing through the Ohio Medical Board so that the students could obtain "doctors' medical licenses."

Defendant Broadwell testified in his own defense, but defendant Ownen did not testify.

While there are fifteen assignments of error attacking inter alia the sufficiency of the indictment, the rulings of the trial judge on motions, the admission or rejection of evidence, the charge of the court, the claims of error, both by way of brief and oral argument, principally involve the proposition urged by counsel for defendants throughout the trial, namely, that since there was no actual diploma published by the defendants, they could not be guilty of offering to sell something which was not theretofore in existence.

It is conceded by the State that there was no actual diploma delivered to any of the State's witnesses nor was any diploma actually exhibited to them. However, the gist of the crime charged by the State is that defendants "offered to sell false medical diploma(s)" in violation of Revised Code Section 4731.47. Thus the question arises as to whether this is a crime within the prohibition of that section. The defendants contend that it is not; that the words "such diploma" immediately following the phrase "offer to sell" refer back to the first words of the statute, that is, to "make, issue or publish a diploma." This contention we think, is highly technical and a strained construction of the statute which cannot be sustained in view of the precise wording of the statute. The Statute, with reference to the words "offered to sell," reads as follows:

> "No person shall * * * offer to sell * * * a diploma falsely representing the holder or receiver thereof to be a graduate of a medical school * * * etc."

To argue that the legislature contemplated the existence of an actual diploma before a person would be guilty of the offense of "offering to sell * * * a diploma falsely representing the holder thereof * * *, etc." is contrary to the purpose for which the statute was enacted. This is the

very thing which the legislature was attempting to prevent. The offense of "offering to sell" in this case was just as serious and it was just as important to prevent the fraud at this stage of development as it would be at a later time when an actual diploma would have been issued. We cannot conceive of the legislature intending this additional element, namely, the issuance or publication of a false diploma, to be present before it could be said that a crime had been committed. The offense complained of was still present. The "offer to sell" had been made and the money had passed to the defendants on the basis of their "offer to sell." The following comments of the Supreme Court in the case of *State v. Healy*, 156 O. S. 228/240 are equally applicable here:

> "Section 12447-1, General Code, was clearly designed and enacted for the purpose of protecting the innocent from ingenuous fraudulent schemes, and that purpose should not be thwarted by an interpretation which would in effect nullify its very salutary provisions.
>
> "Courts will not by the strict construction of penal statutes defeat the intention of the lawmaker * * * A penal statute should receive a reasonable and common sense construction, and 'its force should not be frittered away by niceties and refinements at war with the practical administration of justice.' 2 Sutherland on Statutory Construction (2 Ed.) Section 528.
>
> "The following statement in 37 Ohio Jurisprudence, 750, Section 422, is supported by decisions of this Court there cited:
>
> > * * * while criminal statutes are to be strictly construed in favor of the defendant, the courts are not authorized so to interpret them as to defeat the obvious purpose and intent of the legislature."

The defendants-appellants' claim that the offense set forth in the indictment, that is, "publish and offer to sell,

etc." was not proved since there was no evidence that a diploma was even published, and, therefore, it should have been quashed, is without merit. If it is an offense to "offer to sell a diploma, etc." then the indictment is sufficient even though it has included the words, "and publish." The offense, "offer to sell, etc." is marked in the statute by the disjunctive "or" but the indictment may substitute the conjunctive "and." *State v. Conner*, 30 O. S. 405; *State v. Bauer*, 1 N. P. 103, 1 O. D. 199.

The alleged imperfection in the indictment may be excused by the following parts of Section 2941.08 R. C., which reads:

> "An indictment or information is not made invalid, and the trial, judgment, or other proceedings stayed, arrested, or affected:
>
> * * *
>
> (D) For stating imperfectly the means by which the offense was committed except insofar as means is an element of the offense:
>
> * * *
>
> (I) For surplusage or repugnant allegations when there is sufficient matter alleged to indicate the crime and person charged;
>
> * * *
>
> (K) For other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits."

Section 2945.83 of the Revised Code, also applicable, provides:

> "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:
>
> (A) An inaccuracy or imperfection in the indictment, information, or warrant, provided that the

charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;

(B) A variance between the allegations and the proof thereof unless the accused is misled or prejudiced thereby;

(C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby;

(D) A misdirection of the jury unless the accused was or may have been prejudiced thereby;

(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

Next, it is argued that the hypothetical question propounded to Dr. Moritz was error prejudicial to the rights of the defendants. The error complained of by defendants is the assumption in the question propounded that there was a diploma in existence and that there was a diploma issued. Of course, that was not the fact but clearly it was the end result of the defendants' scheme if it had been consummated and that was the gist of the complaint contended in the indictment, namely, that what they were offering to sell was, in fact, a false diploma. Only by determining that what they were offering to sell was a diploma which was not genuine would the jury be able to determine their guilt or innocence. Under these circumstances, for the purpose of the hypothetical question alone, the assumption of an actual diploma and its issuance was proper.

Complaint is made as to the court's charge. We have examined the charge and find no error prejudicial to the

defendants. To repeat, the gravamen of the offense charged, that of "offering to sell," which by statute is made a crime and the indictment so charges.

The defendants object to the court's use of the word "diploma" in it's charge since there was no showing that actually a diploma was issued to any of the state's witnesses. This is the same argument that is used throughout by the defendants. It is difficult to see how the court could possibly avoid the use of the word "diploma" when the gravamen of the offense charged and the gist of the evidence was that the defendants were "offering to sell a false medical diploma" and that is what the State's evidence shows that they attempted to do.

Upon a review of the entire record, we find no error prejudicial to the rights of the defendants and conclude that the judgment must be and is affirmed.

Exceptions. Order see journal.

KOVACHY, P. J., SKEEL, J., Concur.

APPENDIX B.

Order of the Supreme Court of Ohio Denying Motion for Leave to Appeal From the Court of Appeals of Cuyahoga County.

(Entered November 14, 1956.)

It is ordered by the Court that this motion be, and the same hereby is, overruled.

APPENDIX C.

Application for Rehearing by Defendants-Appellants.

To the Honorable Judges of
The Supreme Court of Ohio:

Appellants, in conformity with Rule XX of the Supreme Court of Ohio, hereby apply for a rehearing of their motion for leave to appeal, which was overruled, and decision of denial announced Nov. 14, 1956, and respectfully represent that the decision and overruling of the motion for leave to appeal and the judgment thereon are erroneous for the following reasons:

1. Said decision and denial of leave and judgment thereon is contrary to *City of Cleveland v. Jorski*, 142 O. S. 529; *Mariemont Taxi, Inc. v. City of Cincinnati*, 162 O. S. 163; *State v. Conley*, 147 O. S. 351; *State v. Chamer*, 115 O. S. 356 and 357.

2. The Common Pleas Court, and the Court of Appeals in affirming the judgment of conviction and sentence of the defendants-appellants,—and thus the Supreme Court of Ohio, by overruling of the motion for leave to appeal from the judgment of the Court of Appeals, deprives the defendants-appellants of their liberty contrary to Amendment XIV, Section 1 of the Constitution of the United States, and without due process of law,—and specifically in this, that none of the elements in the indictment were proved or required to be proved; and likewise, that the Supreme Court of Ohio, by the action overruling the motion for leave to appeal,—and thus affirming the judgment against, and conviction and sentence of the defendants-appellants, as aforesaid, sanctions convictions by the means set forth in the record of the Trial Court, and which was approved by the Court of Appeals, and

that charges in the indictment which required "publishing" as well as "offering to sell an existing diploma" with specified contents, though alleged and recited therein, according to the statute R. C. 4731.47, because not proved, should be disregarded, as if not contained therein; thus allowing convictions contrary to the indictment's requisites, and that of the Ohio Constitution, Art. I, Section 10, which requires an indictment, and conviction only in accordance with proof of all of its allegations.

Wherefore, defendants-appellants respectfully pray that this application be granted.

EDWARD C. STANTON,
JOSEPH R. SLEMMONS,
WALTER I. KREWSON,
Attorneys for Defendants-Appellants.

APPENDIX D.

Denial of Rehearing by Supreme Court of Ohio.

(Entered December 5, 1956.)

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

APPENDIX DD.

Journal Entry of the Court of Appeals.

Dated July 23, 1956:

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellants and therefore the judgment of the Court of Common Pleas is affirmed.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellants except.

APPENDIX E.

Indictment for Offer to Sell False Medical Diploma, G. C. 12701 w/c R. C. 4731.47 w/ct Larceny by Trick R. C. 2907.21.

THE STATE OF OHIO,
CUYAHOGA COUNTY, SS.

Of the term of January, In the year of our Lord one thousand nine hundred and Fifty Four.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, In the Name and by the Authority of the State of Ohio,

Do find and Present, That Robert Broadwell and E. M. B. Ownen on or about the 22nd day of September, 1953, at the County aforesaid,

> unlawfully and fraudulently published and offered to sell to one Joseph M. Centanni a Diploma in Homeopathic Medicine for the sum of $1500.00, without examination, attendance or study, and that said Diploma would represent the said Joseph M. Centanni to be a graduate of a Medical School and entitled to the powers and privileges thereby pretended to be conferred and did further falsely represent that said Diploma would admit the Holder to the practice of Medicine, the said Robert Broadwell and E. M. B. Ownen well knew said representations to be false and were made with intent to defraud

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

APPENDIX F.

Indictment for Offer to Sell False Medical Diploma G. C. 12701, R. C. 4731.47.

THE STATE OF OHIO,
CUYAHOGA COUNTY, SS.

Of the term of January, In the year of our Lord one thousand nine hundred and Fifty Four.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, In the Name and by the Authority of the State of Ohio,

Do Find and Present, That Robert Broadwell and E. M. B. Ownen on or about the 30th day of October, 1953, at the County aforesaid,

> unlawfully and fraudulently published and offered to sell to one Joseph M. Centanni a Diploma in Homeopathic Medicine for the sum of $1500.00 without examination, attendance or study, and that said Diploma would represent the said Joseph M. Centanni to be a graduate of a Medical School, and entitled to the powers and privileges thereby pretended to be conferred and did further falsely represent that said Diploma would admit the Holder to the practice of Medicine, the said Robert Broadwell and E. M. B. Ownen will knew said representations to be false and were made with intent to defraud

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

APPENDIX G.

Statute.

4731.47 (12701). Selling false medical diploma.

No person shall make, issue, or publish, for the purpose of sale, barter, or gift, a certificate, diploma, or other writing or document falsely representing the holder or receiver thereof to be a graduate of a medical school, college, or educational institution of medicine and entitled to the powers, privileges, or degrees thereby pretended to be conferred, or sell or dispose of, or offer to sell or dispose of such diploma, certificate, writing, or document containing such false representation or use his name, or permit it to be used, as a subscriber to such false and fictitious diploma, certificate, writing, or document or engage in the practice of medicine and surgery under and by virtue of such fraudulent diploma, certificate, writing, or document.

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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 774.

ROBERT BROADWELL and
E. M. B. OWNEN,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

The State court has not decided a federal question of substance not theretofore determined by this Court, nor has the State court decided any question in a way not in accord with applicable decisions of this Court. No real or substantial federal question is involved herein.

QUESTION PRESENTED.

Petitioners claim they were denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States in that they were convicted of a felony under a criminal statute of Ohio when (1) the indictment did not charge a crime, and (2) the alleged crime charged in the indictment was not supported by any evidence.

THE STATUTE INVOLVED.

Ohio Revised Code section 4731.47 is set forth as Appendix I.

STATEMENT OF THE CASE.

The petitioners, Robert Broadwell and E. M. B. Ownen, were indicted on two counts in the Common Pleas Court of Cuyahoga County, Ohio, on charges of "Offering to sell false medical diploma," under Ohio R. C. 4731.47, the pertinent part of the first count being as follows:

> "* * * Do Find and Present, That Robert Broadwell and E. M. B. Ownen on or about the 22nd day of September 1953, at the County aforesaid, unlawfully and fraudulently published and offered to sell one Joseph M. Centanni a Diploma in Homeopathic Medicine for the sum of $1500 without examination, attendance or study, and that said Diploma would represent the said Joseph M. Centanni to be a graduate of a Medical School and entitled to the powers and privileges thereby pretended to be conferred and did further falsely represent that said Diploma would admit the holder to the practice of Medicine, the said Robert Broadwell and E. M. B. Ownen well knew said representations to be false and were made with intent to defraud."

The second count of the indictment is similar to the first except as to the date of the offense.

A verdict finding both defendants guilty as charged on both counts was returned by the jury. Both defendants were sentenced to the Ohio State Penitentiary, the sentences on each count to run concurrently.

An outline of the evidence as set forth in the bill of exceptions is substantially this:

On September 22, 1953, Broadwell, of Cleveland, and Ownen, of Arcadia, Missouri, conducted in Cleveland a

meeting attended by seven local chiropractors, whose presence had been arranged for by Broadwell. There the petitioners outlined a plan whereby for $1500 such chiropractors could obtain degrees in homeopathic medicine and licenses to practice medicine in Ohio. Broadwell was to handle arrangements in Cleveland.

Ownen claimed that he had recently acquired a new charter for the American Non-Allopathic University, Incorporated, of Arcadia, Missouri, and that his school was ready to issue diplomas in homeopathic medicine. Those chiropractors accepting the offer were to pay $500 down and $1,000 not later than December 1, 1953, and furnish copies of their degrees and licenses in chiropractic. If such applicants did not have college credits, Ownen would supply such deficiencies through a McKinley-Roosevelt School in Chicago, where for an additional $1,000 a four-year college degree would be furnished without any attendance. When the money and credits were received, the applicants would be placed on Ownen's "preferred list," thus reserving one of thirty-six "select" places, and would immediately receive diplomas in homeopathic medicine from the American Non-Allopathic University, Inc. without attendance, study, or examination, after which they would automatically receive licenses to be issued in either Massachusetts, Connecticut or Rhode Island, according to the applicant's choice, to practice as doctors in homeopathic medicine. Following this and after the applicant had taken a "fixed" total examination in four simple subjects; namely, public health, hygiene, prescription writing, and homeopathic medicine, by means of bribery a license to practice homeopathic medicine would be issued by the Ohio State Medical Board.

Following this meeting, Broadwell on October 30, 1953 visited Dr. Centanni at his office. In the presence of

Robert Drake, a Cleveland Plain Dealer reporter, who was represented as being a chiropractor interested in getting in on the deal, Broadwell again went over the details of the plan. He instructed Dr. Centanni to draw a check for $500 payable to the American Non-Allopathic University and to submit with it a list of his college credits. Dr. Centanni gave Broadwell a check for $500 as instructed, placing it in an envelope on the outside of which were listed his college credits. Broadwell put the check and envelope in his pocket and left. By prearrangement with the police, he was immediately arrested, and when searched, the $500 check and the envelope were found on his person.

Broadwell admitted to the police that he had visited Dr. Centanni, that he was representing a school for the purpose of helping chiropractors obtain medical degrees, that he was presently working at a clinic in Cleveland, that he did not have a medical degree, that he was not licensed by the State of Ohio to practice as a physician, that he used the title of "Doctor" by reason of having attended a school in Missouri for a couple of weeks, that he was a representative of a certain Dr. Ownen, of Missouri "from the American Non-Allopathic University" and was in Cleveland to recruit students and offer a course to help them obtain medical degrees, that the papers and credentials of such students were to be sent through the State of New Jersey, following which New Jersey would return the papers to Ohio for processing through the Ohio Medical Board so that the students could obtain licenses to practice medicine.

On cross examination Broadwell admitted he had been arrested and convicted of using the mails to defraud, that because of this conviction he received an undesirable discharge from the Air Force, that in writing to his former

commanding officer for a letter of recommendation he lied when he stated that he was a graduate of the University of Mexico and had received a degree as a Doctor of Medicine. He admitted writing later to his former commanding officer that "Some time ago I was asked to take a position supervising instruction for a homeopathic group," and that he "later found out some fly-by-night outfit was behind it, and it seems that they had some illegal intentions" and that these statements referred to matters connected with the charges for which he was then standing trial.

Broadwell's testimony in reference to his offer to sell diplomas was in direct contradiction to that given by the witnesses for the State and in contradiction also to the statement he made to the police after his arrest.

Ownen did not testify.

The trial court took judicial notice of section 334.170 of the Missouri Statutes, set forth in Appendix II, which in substance makes the issuance of a medical diploma without certain required attendance, study and examination a criminal offense, and further considered sections 4731.09, 4731.13, 4731.29 and 4731.46 of the Ohio Revised Code, relating to the requirements for admission to the practice of medicine in Ohio and set forth in Appendix III. The record shows that the American Non-Allopathic University of Missouri had never appeared on any list of approved or accredited schools adopted by the State Medical Boards of Massachusetts, Connecticut, Missouri, or Rhode Island, nor did that school appear on the Ohio State Medical Board's list of approved medical schools in either 1953 or 1954; and further, that the Ohio State Medical Board does not issue licenses to any applicant from another state unless the school from which he graduated appears on the Board's approved list. Expert testimony, along with the foregoing, established that the chiropractors purchas-

ing such diplomas would not be qualified for the practice of medicine in Ohio or in any of the other states above mentioned. The defense offered not one word of evidence to the contrary.

ARGUMENT.

1. As to the petitioners' claim that the indictment did not charge a crime.

The Court of Appeals held that an offer to sell a false medical diploma is a crime within the prohibition of Ohio Revised Code 4731.47, stating in its opinion:

> "It is conceded by the State that there was no actual diploma delivered to any of the State's witnesses nor was any diploma actually exhibited to them. However, the gist of the crime charged by the State is that defendants 'offered to sell false medical diploma(s)' in violation of Revised Code section 4731.47. Thus the question arises as to whether this is a crime within the prohibition of that section. The defendants contend that it is not; that the words 'such diploma' immediately following the phrase 'offer to sell' refer back to the first words of the statute, that is, to 'make, issue or publish a diploma.' This contention we think is highly technical and a strained construction of the statute which cannot be sustained in view of the precise wording of the statute. The Statute, with reference to the words 'offered to sell,' reads as follows:
>
> > 'No person shall * * * offer to sell * * * a diploma falsely representing the holder or receiver thereof to be a graduate of a medical school * * * etc.'
>
> "To argue that the legislature contemplated the existence of an actual diploma before a person would be guilty of the offense of 'offering to sell * * * a diploma falsely representing the holder thereof * * *

etc.' is contrary to the purpose for which the statute was enacted. This is the very thing which the legislature was attempting to prevent. The offense of 'offering to sell' in this case was just as serious and it was just as important to prevent the fraud at this state of development as it would be at a later time when an actual diploma would have been issued. We cannot conceive of the legislature intending this additional element, namely, the issuance or publication of a false diploma, to be present before it could be said that a crime had been committed. The offense complained of was still present. The 'offer to sell' had been made and the money had passed to the defendants on the basis of their 'offer to sell'."

2. As to the petitioners' claim that the alleged crime charged in the indictment was not supported by any evidence.

The Court of Appeals held that the crime charged in the indictment was amply supported by the evidence, stating:

"The defendants-appellants' claim that the offense set forth in the indictment, that is, 'publish and offer to sell, etc.' was not proved since there was no evidence that a diploma was even published, and, therefore, it should have been quashed, is without merit. If it is an offense to 'offer to sell a diploma, etc.' then the indictment is sufficient even though it has included the words 'and publish.' The offense, 'offer to sell, etc.' is marked in the statute by the disjunctive 'or' but the indictment may substitute the conjunctive 'and.' State v. Conner, 30 O. S. 405; State v. Bauer, 1 N. P. 103, 1 O. D. 199."

"The defendants object to the court's use of the word 'diploma' in its charge since there was no showing that actually a diploma was issued to any of the

state's witnesses. This is the same argument that is used throughout by the defendants. It is difficult to see how the court could possibly avoid the use of the word 'diploma' when the gravamen of the offense charged and the gist of the evidence was that the defendants were 'offering to sell a false medical diploma' and that is what the State's evidence shows that they attempted to do'."

The petitioners claim that the character of the statute belonged to the category of forgeries—here, of medical diplomas—and not of oral misrepresentations by a person, as only by a document's contents could one defraud, and then because of reliance upon all of the contents. They claim the statute did not deal with what might be done in the future. On the contrary, the statute is not addressed wholly to the selling or offering for sale of forged—as opposed to genuine—diplomas. The statute applies with equal force to offers to sell diplomas issued without the study, attendance and examinations required by law.

CONCLUSION.

The offense charged is "offering to sell" a false medical diploma, which by statute is made a crime, the indictment charges such offense, and the evidence clearly establishes a violation of the statute. An analysis of the record discloses no foundation for the claims advanced for the allowance of the petition. The questions presented in the petition assume facts which are not supported by the record, ignore other facts incontrovertibly established below, and misconstrue the import of the decision of the state court of appeals. That decision presents no novel question of law or conflict with any decision of this Court. The Supreme Court of Ohio properly overruled petitioners' motion for leave to appeal.

There is, therefore, no real or substantial federal question involved herein, and respondent respectfully urges that the petition be denied.

Respectfully submitted,

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Prosecuting Attorney of Cuyahoga County,

SAUL S. DANACEAU,
Assistant Prosecuting Attorney,

DENNIS J. McGUIRE,
Assistant Prosecuting Attorney,

FREDERICK W. FREY,
Assistant Prosecuting Attorney,
Attorneys for Respondent.

APPENDIX I.

Ohio Revised Code 4731.47.

Ohio Revised Code 4731.47 (12701) *Selling false medical diploma.*

No person shall make, issue, or publish, for the purpose of sale, barter, or gift, a certificate, diploma, or other writing or document falsely representing the holder or receiver thereof to be a graduate of a medical school, college, or educational institution of medicine and entitled to the powers, privileges, or degrees thereby pretended to be conferred, or sell or dispose of, or offer to sell or dispose of such diploma, certificate, writing, or document containing such false representation or use his name, or permit it to be used, as a subscriber to such false and fictitious diploma, certificate, writing, or document or engage in the practice of medicine and surgery under and by virtue of such fraudulent diploma, certificate, writing, or document.

APPENDIX II.

Missouri Statute.

Vernon's Annotated Missouri Statutes (1952), Title 22, Chapter 334: *Practitioners of Medicine.*

SECTION 334.170. *Medical schools issuing diploma or certificate—misdemeanor.*

Any officer, agent or employee of any medical school or college in this state, whether organized as a corporation, association, partnership, common law trust, or individually owned and operated, who knowingly permits the issuance of any diploma or any certificate of graduation from any such medical school or college as aforesaid to anyone, unless the recipient or beneficiary thereof has actually attended in good faith at least eighty per cent of each of four school years, each of not less than thirty-two weeks' extent, in this or some other state, and has received instruction in and has satisfactorily passed all the courses and subjects purporting to be required by said school for completion of its course and has actually been granted a degree by vote of the trustees of said college or school, shall be guilty of a misdemeanor and punished by imprisonment in jail for a term of not less than three nor more than twelve months, or by a fine of not less than one hundred dollars nor more than one thousand dollars, or by both such fine and imprisonment. (R. S. 1939, sec. 9985.)

APPENDIX III.

Ohio Statutes.

R. C. 4731.09 *Requirements for admission* (GC 1270).

The state medical board shall appoint an entrance examiner who shall not be directly or indirectly connected with a medical college and who shall determine the sufficiency of the preliminary education of an applicant for admission to the examination. The minimum requirement shall be two years of collegiate work in an approved college of arts and sciences in addition to high school graduation. Provided that students already matriculated and enrolled in their professional colleges shall not be required to have the two years of college work but shall comply only with the preliminary requirements as existing and in effect at the time of their enrollment in their said colleges. In the absence of the foregoing qualifications, the entrance examiner may examine the applicant to overcome deficiencies. When the entrance examiner finds the preliminary education of the applicant sufficient, he shall issue a certificate of preliminary examination upon the payment to the treasurer of the board of a fee of three dollars. Such certificate shall be attested by the secretary.

The applicant must also produce a diploma from a medical institution in the United States in good standing as defined by the board at the time the diploma was issued or produce a diploma from a school or college of osteopathy in the United States in good standing at the time the diploma was issued as defined by a committee consisting of the superintendent of public instruction of the state, a member of the board who holds the degree of doctor of medicine and a member of the board who holds the degree of doctor of osteopathy, or a diploma or license approved

by the board which conferred the full right to practice all branches of medicine or surgery in a foreign country.

* * *

R. C. 4731.13 *Examinations for certificates* (GC 1273).

The examinations of applicants for certificates to practice medicine or surgery or osteopathic medicine and surgery shall be conducted under rules prescribed by the state medical board. Each applicant shall be examined in anatomy, physiology, pathology, chemistry, materia medica and therapeutics, the principles and practice of medicine or osteopathic medicine, diagnosis, surgery, obstetrics, and in such other subjects as the board requires. An applicant who holds the degree of doctor of osteopathy shall be examined in materia medica and therapeutics and the principles and practice of osteopathic medicine by a member of the board who holds the degree of doctor of osteopathy.

* * *

R. C. 4731.29 *Admission by indorsement* (GC 1282, 1282-1).

When a physician or surgeon licensed by the licensing department of another state, a territory or the District of Columbia, or a diplomate of the national board of medical examiners or the national board of examiners for osteopathic physicians and surgeons wishes to remove to this state to practice his profession, the state medical board may, in its discretion, issue to him a certificate to practice medicine or surgery, osteopathic medicine and surgery, or osteopathy without requiring the applicant to submit to examination, provided he meets the requirements for entrance as set forth in section 4731.09 of the Revised Code, but an applicant to practice osteopathic medicine

and surgery must pass examinations in the subjects of materia medica and therapeutics and the principles and practice of osteopathic medicine given by a member of the board holding the degree of doctor of osteopathy and an examination in the subject of bacteriology, preventive medicine, and hygiene given by the board as provided in section 4731.13 of the Revised Code. The fee for registration in this manner shall be fifty dollars. Application shall be made on a form prescribed by the board.

* * *

R. C. 4731.46 *Issuing false medical diploma.*

No person shall make, issue, publish, or cause to be made, issued, or published, for the purpose of sale, barter, or gift, a diploma, certificate, or writing representing the holder thereof to be a graduate of a medical school, college, or educational institution of medicine, unless such holder has attended a complete course of instruction therein, equal to the average course of instruction in other such schools, colleges, or institutions in good standing in this state.

FILED
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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 774.

ROBERT BROADWELL and
E. M. B. OWNEN,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN REPLY AND FURTHER SUPPORTING PETITION FOR A WRIT OF CERTIORARI.

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STATE OF OHIO,

Respondent.

BRIEF IN REPLY AND FURTHER SUPPORTING PETITION FOR A WRIT OF CERTIORARI.

JURISDICTION.

Respondent seeks by simple declaration to remove the force of our authorities. Merely saying there is no crime charged in the indictment, does not make Respondent's statement effective. A reading of the statute (R. C. 4731.47) and the recital of the prosecutor's attitude at the trial (Petitioner's Statement, page 3) make self-evident that no crime was charged or that proof of the statutory crime could be made. The conviction was against due process of law.

REPLY TO ARGUMENT OF RESPONDENT.

A reading of Respondent's Statement shows the intent to persist in the prime purpose of a conviction solely for alleged evil character, rather than that of a crime charged or proved under the Ohio Statute. So strongly was such effort of the State made, that petitioners'

stitutional rights were lost sight of and they were convicted as Respondent reveals for some illegal intentions; it was not for a crime within the terms of the statute or the indictment.

However, the framers of the Constitution knowing that prejudice created against a defendant could be in the lower courts effective established the Supreme Court of the United States, and to this Court, the petitioners submit and say:

There is not a syllable of evidence that there was ever "made, issued or published, fraudulently" (the charge in the indictment, and the statutory requirement) or otherwise, "any diploma." Nor is there any evidence that there was ever "offered for sale any diploma (the charge in the indictment and the statutory requirement) in Homeopathic Medicine."

There is not even any evidence that a false diploma was made or issued, nor did the indictment charge that "any diploma was represented to admit the Holder to the practice of medicine."

It is even no crime, and none could be charged, by an allegation, that "the defendants falsely represented that the diploma would admit the Holder to the practice of medicine," for the Statute required that the diploma contain the misrepresentation, and not that individuals make representations outside of the diploma.

It will not do for Respondent to argue conversations or the forcing of a worthless check on a non-existing bank deposit on a defendant as part of a trap,—when no diploma was ever in existence,—as the equivalent of an offer of sale of such non-existing diploma; for such conversations or acts could not make the crime charged in the indictment.

See 23 Pac. (2d) 94, *People v. O'Bryan;*
12 Fed. 52, *U. S. v. Stephens*, syl. 2;
8 O. S. 630, *Clarke v. State*, syl. 1.

See also, 19 O. S. 211, *Drake v. State*, syl. 1, and page 216, where the court said

> "an oral representation of defendant, that he was endorsing the name of the payee (which the face of the bill clearly showed to be false) cannot constitute the crime of forgery."

Dr. Centanni, the prosecuting witness to whom it was charged the alleged misrepresentation was made, knew that there was no certificate or diploma ever "made, issued or published,"—let alone one "capable of conferring the powers and privileges" of a Doctor of Medicine. An oral representation could not do so.

The Respondent's argument amounts to this: the State does not need to prove what is charged in the indictment, nor are the words of a criminal statute to govern, but that having regard to some supposed purpose of a Legislature, a defendant is to be judged according to the character the State's testimony presents him; and when convicted by such methods, he has had "due process of law."

We deny this, and earnestly pray this Petition for Certiorari be entertained; for the full record will overthrow the proceedings of the lower Courts.

Respectfully submitted,

ROBERT M. KREWSON,
Counsel for Petitioners.

EDWARD C. STANTON,
JOSEPH R. SLEMMONS,
WALTER I. KREWSON,
Of Counsel.

MOTION FILED MAY 17 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 774

E. M. B. OWNEN, *Petitioner*

v.

STATE OF OHIO, *Respondent*

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING

and

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 774

E. M. B. OWNEN, *Petitioner*

v.

STATE OF OHIO, *Respondent*

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Your Petitioner, E. M. B. Ownen, by his Washington counsel, Charles Orlando Pratt, respectfully moves This Honorable Court for leave to file his Petition for Rehearing of the Petition for a Writ of Certiorari; the time for which has expired for more than twenty-five days have elapsed after entry of Order of this Court denying said Petition for Writ of Certiorari on March 25, 1957.

This motion is supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, which certificate is set forth herein.

This petition for rehearing is based upon the ground that the Supreme Court of Ohio has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court (Common Pleas Court of Cuyahoga County, Ohio), as to call for an exercise of this Court's power of supervision.

The reason for the necessity for filing this Motion beyond the twenty-five days after the decision of this court in denying the Petition for Writ of Certiorari is because Washington counsel of record in this case understood and believed that Cleveland counsel of record who appeared on the Petition was going to prepare and file a Petition for Rehearing within the time limit under Rule 58 of the Revised Rules of this Court. Washington counsel and the Petitioner had every reason to rely upon the understanding that Cleveland Counsel would prepare and file said petition for rehearing. That Cleveland counsel for the Petitioner did not do so was not known to the Petitioner or Washington counsel until the twenty-five days in which to file said Petition had elapsed, and after which time Cleveland counsel advised the Petitioner and Washington counsel by letter that he had decided not to do so because of the added expense and the likelihood that the Petition for Rehearing would be denied, although he expressed the opinion that he did not agree with the judgment of any of the lower courts in this case.

Washington counsel, at the request of Petitioner, would have prepared and filed within the time limit, the Petition for Rehearing, based on his strong convictions that the lower courts were wrong, had he or

his client known that Cleveland Counsel was not going to do so.

The delay in filing this Motion and Petition is due to the necessity of Washington counsel to study all the briefs and records in this case after the time for filing had expired under Rule 58 of this Court. The extent of the delay is due to previous court commitments of Washington counsel which he would not have made had he known Cleveland counsel did not intend to prepare and file such petition for rehearing.

The Brief in Reply and Further Supporting Petition for Writ of Certiorari which was prepared and filed by Cleveland counsel of record did not arrive in the office of the Clerk of this Court until Friday, March 22, 1957, after which it was placed on the desks of the Justices during the course of their conference in which their decision was made to deny the Petition and the Order which was entered on the following Monday, March 25, 1957. This technical filing of the said brief at the last minute on that day of consideration did not give the justices time in which to consider it in the same manner as if they had had it for at least several days, even though it is recognized that such brief was not prerequisite to any decision of this court.

Wherefore, the premises considered, your Petitioner earnestly prays that this Motion be entertained.

Respectfully submitted,

Charles Orlando Pratt
Washington Counsel
for Petitioner

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

E. M. B. Owsen, your petitioner, prays that this Court grant rehearing of its Order of March 25, 1957, denying the petition for writ of certiorari, 77 Supreme Court Reporter, 668, and that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in the above-entitled case as prayed for in the petition docketed on February 14, 1957.

Reasons for Granting Rehearing and Issuing the Writ

The Supreme Court has consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of its rules. *U. S. v. The Ohio Power Company*, No. 312 Decided April 1, 1957, 77 Supreme Court Reporter 652.

Statement of the Case

There is no need to set forth again the facts and circumstances of this case because they are clearly before the Court in the Petition for a Writ of Certiorari.

Your petitioner herein respectfully submits that he was denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States because he was convicted of a felony under a criminal statute of Ohio, when the indictment did not charge a crime against him and the alleged crime charged in the indictment was not supported by any evidence presented against him that he offered to sell a diploma.

There are set forth herein below substantial grounds available to petitioner although not previously pre-

ended (Schriber-Schroth Co. v. Cleveland Trust Co., 305 U.S. 47, 59). There appears to be no evidence in this case that would warrant the indictment of defendant Ownen under the statute involved.

It is important to the defense of anyone charged with a crime to be confronted with the evidence and particularly, the document involved. Judge Hurd of the Court of Appeals of Ohio in his opinion, page 10 appendix A, of Petition for a Writ of Certiorari, said, "The error complained of by defendants is the assumption in the question propounded that there was a diploma in existence and that there was a diploma issued. *Of course, that was not the fact* but clearly it was the end result of the defendants' scheme *if it had been consummated* and that was the gist of the complaint contended in the indictment, namely, that what they were offering to sell was in fact a false diploma. Only by determining that what they were offering to sell was a diploma which was not genuine would the jury be able to determine guilt or innocence. Under these circumstances, for the purpose of the hypothetical question above, the assumption of an actual diploma and its issuance was proper." (Italics supplied).

It is clear that none of the elements in the indictment was proved or required to be proved against Ownen, and the charges in the indictment against Ownen which required "publishing" as well as "offering to sell an existing diploma" with specified contents, though alleged and recited therein according to the statute, R. C. 4731.47, became not proved, should be disregarded, as if not contained therein. There is no evidence in the record that Ownen was present at

the time Broadwell offered to sell a non-existent diploma, or that he knew of such offer being made.

The said Judge of the Court of Appeals of Ohio in his opinion, page 13, Appendix A of Petition for a Writ of Certiorari, said "*It is conceded by the State that there was no actual diploma delivered to any of the State's witnesses nor was any diploma actually exhibited to them.*" (Italics supplied). Your petitioner contends that this imperfection in the indictment against Owsen is not cured by Section 2941.08 R.C. and therefore the indictment against him is made invalid, and the trial, judgment, and other proceedings against Owsen should be stayed, arrested or affected for stating imperfectly the means by which the offense was committed because the means was in fact and law an element of the offense; and because there was not sufficient matter alleged to indicate the crime charged against him as distinguished from Broadwell without alleging that there was in fact a diploma in existence since Owsen did not in fact offer to sell any diploma, and such defect did tend to prejudice the substantial rights of the defendant Owsen upon the merits. He could not well defend his constitutional rights concerning a diploma which did not exist and which he did not offer to sell. It must be remembered that defendant Owsen never had such a diploma and he has always denied that he had any part in the transaction of the other defendant, Broadwell, whom the Court proved did attempt to sell a diploma which was non-existent.

The Supreme Court said, in *Holland* v. *United States*, 348 U.S. 121, at page 129, "Trial Courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which though

difficult for the prosecution to utilize, is equally hard for the defendant to refute. Charges should be especially clear, including in addition to the formal instructions, a summary of the nature of the act worth method, *the assumption on which it rests, and inferences available both for and against the accused.* Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation". (Italics supplied)

The record in this case unequivocally shows that defendant Ownen was not present at the time defendant Broadwell allegedly attempted to sell a diploma. The records show and the Court admits that there was no diploma in existence but notwithstanding the non-existence of a diploma, the Court convicted Broadwell of the "offer to sell" a diploma, etc. The Appellate Court of Ohio said, in this connection, Appendix A, Page 15 of Petition for Writ of Certiorari, "If it is an offense to 'offer to sell a diploma, etc.' then the indictment is sufficient even though it has included the words, 'and publish'. The offense, 'offer to sell, etc.' is marked by the disjunctive 'or' but the indictment may substitute the conjunctive 'and'." But such "offer to sell" did not, and should not apply to Ownen, as aforesaid.

It is clear that the defendant Ownen alone would not and could not have been convicted of the offense charged against Broadwell, based upon the indictment or the reasoning of the courts below for he was not present at the time of the offense, he did not offer to sell anything; he had no diploma to sell; he pleaded "not guilty" to the offer to sell a diploma; he re-

ceived no money for it; and he never confirmed or authorized, or ratified the sale of any diploma. He was not charged with a conspiracy to commit, with Broadwell, any crime in connection with the statute involved; and since the offense for which Broadwell was convicted was "offer to sell" without a diploma; it is difficult to reason how, under due process of law, Owsen, could be convicted of the same offense of "offer to sell" in the absence of the existence of any diploma; and since his plea was "not guilty", and no evidence was introduced in the record that he, Owsen, "offered to sell" a diploma; or had one to sell. How could Owsen defend himself under these circumstances? In the absence of the existence of a diploma; and in the absence of any evidence introduced in the trial of the case that Owsen offered to sell a diploma for which defendant Broadwell was indicted and convicted, it would appear that defendant Owsen was indicted, convicted and sentenced for an offense which he did not commit. The indictment would never have stood up against defendant Owsen if he had been tried alone, bearing in mind no conspiracy was alleged or tried against him.

In this case there should have been a separate trial for defendant Owsen where a confession implicating Owsen by Codefendant Broadwell was not made in the presence of Owsen and for that reason was not binding on him was offered in evidence without deletion of objectionable parts of the confession (*State* v. *Roars*, 151 Oh 339, 39 O Ops. 162, 86 NE 2d 24. The Supreme Court of the United States can take cognizance, *sua sponte*, of this serious and material error which was prejudicial to defendant Owsen.

Under the circumstances, defendant Owsen has been deprived of due process of law under the Fourteenth Amendment of the Constitution of the United States. He could not defend himself in the trial except to say "I am not guilty as charged; I did not offer to sell a diploma and I had no diploma for sale and none was in existence."

The Trial Court did not introduce evidence that defendant Owsen offered to sell a diploma. The Trial Court did not introduce evidence that he had a diploma for sale. It did not introduce evidence that he was present at the time defendant Broadwell offered to sell a diploma. It did not charge defendant Owsen with conspiracy to violate the statute involved. The trial court did not introduce any evidence that defendant Owsen ever profited by defendant Broadwell's offer to sell a diploma.

In view of the foregoing, your petitioner Owsen, was indicted, tried, convicted and sentenced solely on the ground that defendant Broadwell was convicted of offering to sell that which neither he nor Owsen had.

On the theory that a defendant is innocent until proven guilty under our Constitution and under our form of government, and on the fundamental law of the land that criminal statutes are to be strictly construed in favor of the defendant, and on the ground that to so construe the statute involved would not defeat the obvious purpose and intent of the legislature insofar as defendant Owsen is concerned, the trial of the defendant Owsen with defendant Broadwell was error prejudicial to his rights and to the defenses available to him in a separate trial.

CONCLUSION

For the reasons set forth above and in the petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a Writ of Certiorari issue to the Supreme Court of Ohio on the ground that it has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

CHARLES ORLANDO PRATT
Counsel for Petitioner

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds above specified and pursuant to Rule 58 of the Rules of this Court.

CHARLES ORLANDO PRATT
Counsel for Petitioner